Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RUBEN CARNERO, PETITIONER

v.

BOSTON SCIENTIFIC CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Marina Tramontozzi
Counsel of Record
Edward Griffith
Bolatti & Griffith LLP
45 Broadway, Suite 2200
New York, NY 10006
Tel: 212-363-3780
Attorneys for Petitioner

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QUESTION PRESENTED

Whether the judicially created presumption against extraterritorial application of domestically oriented legislation recognized in cases such as *Foley v. Filardo*, 336 U.S. 281 (1949) applies to the "whistleblower" section of the Sarbanes-Oxley Act?

The Opinion of the United States Court of Appeals for the First Circuit for which review is sought, *Carnero v. Boston Scientific Corporation*, 433 F.3 1 (2006), answered this question in the affirmative, holding that the whistleblower section of the Sarbanes-Oxley Act applies only to domestic employees of companies subject to the Act. The SEC has determined that other sections of the Sarbanes-Oxley Act, which use essentially identical language to define their scope, apply extraterritorially. *See, e.g.*, SEC Release Nos. 33-8177; 34-47235 (at § II.C), 68 F.R. 5110, 5120 (January 31, 2003) (interpreting sections 406 and 407 of the Act); SEC Exchange Act Release Nos. 34-47225, IC-25909, 2003 SEC LEXIS 184 (January 22, 2003) at § 11.B (interpreting section 306 of the Act).

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Petitioner Ruben Carnero petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The First Circuit's Opinion is reported at 433 F.3d 1 and reproduced in the Appendix at 1(a). The Opinion affirms a Memorandum of Decision issued by the United States District Court for the District of Massachusetts dismissing Mr. Carnero's complaint. That Memorandum of Decision, which is unpublished, is reproduced at Appendix 40(a). On February 2, 2006, the First Circuit issued an Order denying Mr. Carnero's petition for panel and en banc rehearing. A copy of that Order is reproduced at Appendix 45a.

JURISDICTION

The First Circuit issued its Opinion on January 5, 2006. A timely petition for panel and en banc rehearing was denied on February 2, 2006, resulting in a deadline of May 3, 2006 for the filing of this Petition for a Writ of Certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Section 806 of the Sarbanes-Oxley Act (the "Whistleblower section"), codified at 18 U.S.C. § 1514A(a) and reproduced at Appendix 46(a).

STATEMENT

This petition seeks review of an opinion of the First Circuit holding that the "whistleblower" section of the Sarbanes-Oxley Act does not apply to overseas employees of companies otherwise covered by the Act. Even though the statutory language applies to any employee of covered companies, the First Circuit restricted the statute to domestic employees by applying the judicially created presumption against extraterritorial enforcement of domestically-oriented statutes recognized in cases such as *Foley v. Filardo*, 336 U.S. 281 (1949).

The First Circuit's opinion conflicts with the SEC's determination that other sections of the Sarbanes-Oxley Act, which use essentially identical language to define their scope, apply extraterritorially. The SEC has ruled that its interpretation of the statutory language:

> comports both with the plain language of the above statutory sections . . . as well as with the overarching purpose of the Sarbanes-Oxley Act, which is to restore investor confidence in US financial markets, regardless of the origin of the market participants.

SEC Release Nos. 33-8177; 34-47235 (at § II.C), 68 F.R. 5110, 5120 (January 31, 2003) (interpreting sections 406 and 407 of the Act).

The First Circuit recognized that its decision is at odds with the Act's overarching purpose of protecting the integrity of US securities markets, conceding that

> [f]rauds against foreign subsidiaries uncovered by foreign whistleblowers may, undoubtedly, threaten US investors in the parent just as do domestic frauds.

App. 12a-13a; 433 F.3d at 8. Indeed, by excluding overseas employees from the statute's scope, the First Circuit's opinion may insulate foreign operations of covered companies from an important enforcement mechanism of the Act.

The First Circuit nevertheless felt compelled by the *Foley* presumption to reject the plain meaning of the statutory language because the Court could not discern an express statement in the Act's legislative history that Congress intended the whistleblower section to apply extraterritorially. App. 17a-25a; 433 F.3d at 11-14.

The issue arose in this case when petitioner Ruben Carnero filed a complaint under the Sarbanes-Oxley whistleblower section with the United States Department of Labor in July 2003. Between 1997 and 2002, Mr. Carnero held a variety of senior management positions for Boston Scientific Corporation, including Latin American Business Development Director, Country Manager for Argentina and Country Manager for Brazil. Although he was hired by managers in the company's Massachusetts headquarters and he traveled to Massachusetts frequently during his employment, Mr. Carnero was always stationed in Latin America. He consistently received excellent performance evaluations from headquarters staff and regularly received stock option awards, which are reserved for senior management employees "who demonstrate the

greatest potential for long term effect upon the value and success of the business."

After Mr. Carnero discovered that false invoices and inflated sales reports were being generated in the company's Argentine and Brazilian subsidiaries, he met with headquarters staff in May 2002 to insist that they investigate the problem. He was told that an in-house lawyer would lead the investigation and report the results to senior management as well as to Mr. Carnero. In August 2002, however, four headquarters executives, including the lawyer assigned to investigate the false sales problem, traveled to Brazil, where Mr. Carnero was then stationed. Mr. Carnero was asked to meet with them in one of their hotel rooms, where he expected to be told the results of the lawyer's investigation. Instead, Mr. Carnero was summarily terminated, prohibited from returning to his office and told only that he was being fired for "differences in management style."

The Department of Labor issued a preliminary decision dismissing Mr. Carnero's whistleblower claim pursuant to the *Foley* presumption. *See Carnero v. Boston Scientific Corporation*, 2004-SOX-22 (OSHA Reg'l Adm'r) (Dec. 19, 2003). Mr. Carnero then sought *de novo* review from the district court pursuant to the provision of the whistleblower section providing that a claimant may bring a federal court action if the Secretary of Labor has not issued a final decision within 180 days. *See* 18 U.S.C. § 1514A(b)(1)(B). Both the district court and the First Circuit issued opinions dismissing Mr. Carnero's whistleblower complaint based on the *Foley* presumption. The First Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 because the

district court's dismissal of Mr. Carnero's complaint is a final order or judgment that disposed of all of the parties' claims.

REASONS FOR GRANTING THE PETITION

I. THE TERRITORIAL SCOPE OF THE SARBANES-OXLEY ACT IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

A. A Conflict Exists Between the First Circuit's Opinion and the SEC's Determinations Regarding the Act's Territorial Scope.

The First Circuit recognized that Congress used essentially the same language to define the scope of the whistleblower section of the Sarbanes-Oxley Act as it did to define the scope of most of the other sections of the Act. App. 34(a) n. 6; 433 F.3d at 10 n. 6. In particular, both the whistleblower section and most of the Act's other sections define their scope by referring to the registration and reporting requirements that apply to companies listed on US securities exchanges.[1]

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[1]In particular, most of the Act's sections apply to "Issuers," which is defined in Section 2(a)(7) of the Act as "an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) (15 U.S.C. 78o(d), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn." The whistleblower uses the text of the definition of Issuer to define its scope with the exception that the last phrase of the definition, "or that files or has filed a registration statement that

Those registration and reporting requirements apply to both domestic and foreign companies listed on US securities exchanges. App. 8(a), 433 F.3d at 5-6 (citing *Pinker v. Roche Holdings*, 292 F.3d 367 (3d Cir. 2002)). More than one thousand foreign companies were listed on such exchanges as of December 31, 2003. *Id.* (citing SEC's website).

The First Circuit and the SEC, however, have interpreted the statutory language defining its scope to have vastly different geographic scope. Relying on the plain meaning of the statutory language and the statute's purpose of protecting investors in companies listed on US securities exchanges, the SEC has held that the language has extraterritorial scope. *See, e.g.*, SEC Release Nos. 33-8177; 34-47235 (at § II.C), 68 F.R. 5110, 5120 (January 31, 2003) (interpreting sections 406 and 407 of the Act); SEC Exchange Act Release Nos. 34-47225, IC-25909, 2003 SEC LEXIS 184 (January 22, 2003) at § 11.B (interpreting section 306 of the Act).[2] In contrast, the First Circuit relied on the *Foley*

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has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn" is not included. The scope of the whistleblower section is therefore slightly narrower than the scope of most of the other sections of the Act because it does not apply to companies that have filed a registration statement to become listed on a US securities exchange that has not yet become effective.

[2] *See also, e.g.*, SEC Release Regarding Regulations for Section 307 of the Sarbanes-Oxley Act, Exchange Act Release Nos. 33-8185, 34-47276, IC-25929, 2003 SEC LEXIS 256 (January 29, 2003); SEC Release Regarding Regulations for Section 802 of the Sarbanes-Oxley Act, Release Nos. 33-8180, 34-47241, IC-25911, FR-66, 2003 SEC LEXIS 196 (January 24, 2003).

presumption to restrict the statutory language to domestic conduct. *See, e.g.*, App. 10a, 433 F.3d at 6 ("if Carnero's whistleblowing had occurred in this country relative to similar alleged domestic misconduct by domestic subsidiaries, he might well have a potential claim").[3]

This Court recently reaffirmed the principle that identical statutory language used in different sections of the same statute must be given the same meaning. *Clark v. Martinez*, 543 U.S. 371, 125 S.Ct. 716, 722-23 (2005). In *Small*, which involved identical language used in three separate sections of an immigration statute, this Court explained:

> The operative language [used in the immigration statute] applies without differentiation to all three categories of aliens that are its subject. *To give these same words a different meaning for each category would be to invent a statute rather*

[3]Ordinarily, the SEC's interpretation would be given controlling weight since federal courts must defer to administrative interpretations that are not "arbitrary, capricious or manifestly contrary to the statute" where, as here, Congress explicitly delegated such rule-making authority to the agency. *Chevron v. NRDC*, 467 U.S. 837, 844 (1984); *United States v. Mead Corporation*, 533 U.S. 218, 226-27 (2001). *See also, e.g.*, Section 307 of the Sarbanes-Oxley Act (delegating such rule-making authority to the SEC); App. 34(a)-35(a) n. 8, 433 F.3d at10 n.8. In contrast, even though the Congress directed the DOL to administer whistleblower complaints, Congress did not delegate rule-making authority to the DOL, which has expressly refrained from promulgating a policy regarding the territorial scope of the whistleblower section. App. 29(a), 433 F.3d at 17 (quoting DOL Sarbanes-Oxley *Regulations*, 69 Fed. Reg. 52104-01, 52105, 2004 WL 1876043 (Aug. 24, 2004)).